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Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

APR 1 1963

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ERTRUDE H. SNYDER,
Plaintiff and Respondent,

vs.

Case No. 9936

BERT JAMES CLUNE and
ROY M. STOKES,
Defendants and Appellants.

FILED

DEC 20 1963

RESPONDENT'S BRIEF

Clerk, Supreme Court, Utah

PEAL FROM THE ORDER OF THE DISTRICT COURT FOR
TAH COUNTY, HONORABLE JOSEPH E. NELSON, JUDGE

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TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE-----	1
DISPOSITION IN LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	1
STATEMENT OF FACTS -----	2
ARGUMENT -----	3
POINT 1. THAT THE ABSENCE OF DEFENDANTS FROM THE STATE OF UTAH TOLLED THE RUNNING OF THE STATUTE OF LIMITATIONS AND, THEREFORE, PLAINTIFF'S ACTION IS TIMELY. -----	3
CONCLUSION -----	18

CASES CITED

Boode v. Flynn, et al, 252 N.W.R. 284 (Wisconsin). -----	10
Keith O'Brien Company v. Snyder 51 U. 227, 150 P. 954 (Utah). -----	5
Paulina Nick Seely, Administratrix of Estate of Jacobsen E. Seely v. Amelia G. Cowley, Administratrix of the Estate of James H. Cowley, 365 Paci- fic Reporter, 2nd 53 (Utah).-----	7
Itaten v. Weiss, 308 P. 2nd 1021 (Idaho). -----	13

TEXTS CITED

119 A.L.R. 333 -----	9
----------------------	---

STATUTES CITED

'8-12-35 U.C.A. 1953 -----	4
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IN THE SUPREME COURT
of the
STATE OF UTAH

GERTRUDE H. SNYDER,
Plaintiff and Respondent,
vs.
ROBERT JAMES CLUNE and
ROY M. STOKES,
Defendants and Appellants.

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) Case No. 9936
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RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries alleged to have been received in an automobile accident on a public highway in Utah County, Utah.

DISPOSITION IN LOWER COURT

Defendants moved the lower court to dismiss the action on the grounds that the Complaint of plaintiff was barred by the Statute of Limitations. The lower court denied the motion. Appellants then petitioned this court for an intermediate appeal which was granted.

RELIEF SOUGHT ON APPEAL

Appellants ask that the Order of the lower court denying their motion to dismiss be reversed and that the action be dismissed.

STATEMENT OF FACTS

The following facts are apparent from the record or were agreed to by counsel at the hearing on appellants' motion to dismiss.

1. This is an action for personal injuries alleged to have occurred in an automobile accident on a public highway in Utah County, Utah, on December 14, 1958.

2. Defendants and Appellants are not residents of the State of Utah, but reside in the State of California, and as far as known have not been in the State of Utah since the happening of this accident.

3. Plaintiff filed the Complaint in question (Civil No. 24,751) in the office of the Utah County Clerk on December 17, 1962 -- four years and three days after the happening of the accident.

4. Plaintiff filed an earlier complaint in the office of the Utah County Clerk (Civil No. 24,555) on December 13, 1961.

Defendants and appellants moved the court to dismiss the complaint upon the grounds that the four years Statute of Limitations had expired. At the hearing on the argument plaintiff raised three points which she alleges are a complete answer to her failure to file within the period limited by statute. These are:

1. That the filing on December 17, 1962, was

timely because of an intervening weekend during which time the office of the Utah County Clerk was legally closed.

2. That plaintiff filed an action arising out of this accident for these injuries on December 13, 1961, in Utah County (Civil No. 24,555) on which no action was taken, but which plaintiff claims had the effect of extending the time for filing for one year from December 13, 1962.

3. That the absence of defendants from the state of Utah tolled the running of the Statute of Limitations and, therefore, plaintiff's action is timely.

Plaintiff submits that under point #3 which was relied on by the court, that the lower court did not err in denying defendants motion to dismiss, and show this by consideration of point #3 raised by the plaintiff, and this point will be treated as Point 1 of this brief.

ARGUMENT

POINT 1.

THAT THE ABSENCE OF DEFENDANTS FROM THE STATE OF UTAH TOLLED THE RUNNING OF THE STATUTE OF LIMITATIONS AND, THEREFORE, PLAINTIFF'S ACTION IS TIMELY.

We submit that the issue raised by Defendants and Appellants motion is controlled by Utah Code Annotated, 1953, 78-12-35, which reads as follows:

Effect of absence from state.--"If when a cause of action accrues against a person when he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

Council for the defendants and appellants stipulated and admitted to the lower court that the defendants have been residents of the state of California ever since the cause of action arose, and still are residents of the state of California. The language of the statute, we feel, is very explicit and clear when it reads, "...and if, after a cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action." We submit there is no ambiguity in the wording of the statute; the law simply says that if the defendants after the cause of action arose depart from the state, the time that he is absent does not limit the commencement of the action.

The defendants in answer to the above section of the statute contends that due to the fact that the Secretary of State could be served so as to acquire jurisdiction of the defendants and appellants, that the statute on absence of the

defendants from the state has no application. Reading of the Non-resident Motorist Vehicle Act, Utah Code Annotated, 1953, 41-12-8, shows no reference whatsoever to the Utah statute on the effect of absence from the state. If it was the intent of the legislature to cut down the meaning and effect of the statute dealing with absence from the state, they would have, we submit, stated in the Non-resident Motorist Vehicle act.

In the case of Keith O'Brien Company vs. Snyder, 51 U. 227, 160 P. 954, the Utah Supreme Court had before it the Utah statute wording exactly as set forth in Section 78-12-35, Utah Code Annotated 1953. The court found that the defendant departed from the state and was absent therefrom for a period in excess of 5½ years. It was contended that an action could have been commenced against the defendant at any time by serving process on defendant's wife at the family residence or place of abode.

The Third Judicial District Court in and for Salt Lake County, State of Utah, found that the action was not barred by the Statute of Limitations, and that the plaintiff was entitled to judgment. The Supreme Court after review of the authorities of the meaning of the statute relative to absence from the state said:

"It is not necessary to further review, or quote from, the cases; it must suffice that the great, the overwhelming weight of authority, under statutes like ours, is in support of the decision of the District Court."

The court pointed this out in connection with interpreting statutes the fundamental rule when it stated:

"To hold that there is no difference between 'being out of the state' and being 'absent from and resides out of the state' is doing much more than construing the meaning of language, which is a judicial function; it is adding words to those used by the lawmaking body, which is a legislative function." (Underlining supplied)

The Court in conclusion said:

"Indeed, the authorities that hold that absence from the state tolls the statute, all agree that the statute runs only during the time the debtor is openly in the state and immediately on his leaving it the statute again ceases to run until his return, and that in computing time all the periods of absence must be considered and added together.

In view of the foregoing but one conclusion is permissible, which is, that the judgment of the district court is right, and should be affirmed. Such is the order."

Defendants and appellants contend that the 'Brien case having been decided prior to the on-resident Motorist Vehicle Act is in effect voided by the passage of the Non-resident

Motorist Vehicle Act. There is not a Utah Supreme Court decision which supports defendants and appellants contention. There is a late Utah Supreme Court decision which indicates support of the decision of the Keith O'Brien case.

This is the case of Paulmina Nick Seely, Administratrix of the Estate of Jacobsen E. Seely, Plaintiff and Appellant, vs. Amella G. Cowley, Administratrix of the Estate of James H. Cowley, aka James Hall Cowley and James Cowley, Defendant and Respondent, decided October 9, 1961, 365 Pacific Reporter, 2nd, page 63.

The Supreme Court held that absence from the state of the motorist's administratrix tolled the running of the two year statute of limitations for wrongful death. The appellant contended that the court erred in applying this provision in the statute of limitations because the defendant almost immediately after, the administratrix absented herself from the state of Utah, and had been out of the state ever since, and that therefore the court should have applied the provisions of Section 78-12-35, Utah Code Annotated 1953, the statute on effect of absence from the state, the same identical statute which is involved in our case.

"Having determined that our statute of limitation on wrongful death is not a limitation on liability, the question remains as to whether the provisions of Section 78-12-35 apply to a duly appointed personal representative of an estate.

The problem where a personal representative who can be sued has been appointed is different from that in which no representative has been appointed. In the latter instance our probate code gives a creditor a right to apply for letters of administration if those who have preference do not apply at least within three months. In the case of a personal representative who has been appointed absenting himself from the state there is no absolute remedy to which a creditor is entitled. Absence from the state is not among the grounds listed for revocation of letters of administration under the provisions of Section 75-5-1, Utah Code Annotated, 1953, although it might be a reason deemed sufficient by a court and thus be a ground for removal under the authority of that section. Nevertheless, whether such a reason would be deemed sufficient by a court would depend upon the discretion of that court. Although a court's discretion cannot be arbitrarily used, it could well be before that determination was made the two years would have elapsed and a person who had a good cause of action would thus be deprived of his rights unless the absence of the personal representative of the estate of the wrongdoer tolled the statute just as it does if the wrongdoer himself is alive and is absent from the state. For this reason we are of the opinion that Section 78-12-35 Utah Code Annotated 1953, applied to a personal representative of an estate who absents himself from the state and therefore the court erred in granting the dismissal of the action on the ground that the action had not been brought within two years as provided in Section 78-12-35, Utah Code Annotated, 1953. Reversed, Costs to appellant."

We observe that the court had before it the question of absence of the defendant from the state and said nothing by way of overruling the O'Brien case. Also, that a new administrator could have been appointed, but that the defendant who was appointed was absent from the state, and in his absence, the court held, tolled the running of the statute.

The Supreme Courts of Alabama, Illinois, Indiana, Iowa, and Washington, cited in 119 ALR page 333, take the view that the statute similar to the Utah statute is unequivocal in comprehensive terms, and provides for the suspension without regard to the character of the action as in personam, in rem, or quasi in rem, and that the legislature had intended that proceedings in rem which may be substituted for remedies in personam (such as attachment), should be excluded from the operation of the suspension provision, if the statute would have so provided, and that an exception to that provision may not be made by implication. The ALR Annotated points out that this argument is adopted by the greater weight of authority. Cases from some twenty-seven states are listed in support of the view that the running of the statute was tolled during the defendant's absence from the state.

In Bode vs. Flynn et al, a Wisconsin case,

252 NWR, page 284, the court held that an action for damages brought more than six years after occurrence of collision against non-resident defendant was not barred by limitations, even though plaintiff could have served process upon Secretary of State as permitted by statute. This case is almost identical with our case in so far as the points of law raised by the defendant are concerned, and represents the majority opinion. We submit that this case sets forth the correct line of reasoning.

The court said the following in 252 NWR, page 285:

"The appellants claim that section 35.05 (3), Stats., which makes the secretary of state the attorney of a non-resident upon whom summons and complaint may be served in action growing out of his use of an automobile on the highways of the state, takes the defendants out of section 330.30, Stats., which is to the general effect that, when a person is out of the state when a cause of action accrues against him, the statute of limitation does not commence to run until he comes into or removes to the state, and leaves the limitation statute applicable in his favor. The argument is that the purpose of the limitation statute is to give the claimant six years in which to bring this suit; and the purpose of exempting the period of absence from the state is to give the claimant the full period from the time he may commence his suit; and these purposes are fully effected by the statutory provision for commencing suit by service of process upon the secretary of state. The

respondent claims that the decision of this court in *State v. National Accident Society of N.Y.*, 103 Wis. 208, 79 N.W. 220, 223, rules the point against the appellants.

The case relied on by respondent was decided in 1899. The action was brought by the state against a foreign insurance corporation after it had withdrawn from the state to recover the license fees for previous years during which it had been licensed to do business therein. When the action was begun more than six years had elapsed since the first fee involved was payable. When the cause of action for this license fee accrued, the statutes of limitation were as contained in R.S. 1878. The section of those statutes applying to actions to recover for injuries to persons and property, and the statutes applying to persons without the state when the cause of action accrued, so far as here material, except in particulars later mentioned, were the same as the present statutes. Section 4222, subd. 5, Rev. St. 1878, section 330.19 (5) Stats. 1931; section 4231, Rev. St. 1878, section 330.30, Stats. 1931. The latter statutes provide that: 'If, when the cause of action shall accrue against any person he shall be out of this state, such action may be commenced within the terms herein respectively limited after such person shall return to or remove to this state.' During the period wherein the license fees sued for were payable, sec. 1915 subd. 2, Stats. 1898, made the insurance commissioner do business in the state upon whom legal process might be served. The court stated that it was "not unmindful of the * * * doctrine, that when a corporation, pursuant to a statutory requirement, maintains an attorney in the state upon whom process can be served * * * it is a resident of the

state for all the purposes of litigation and therefore entitled to the benefit of exemption (general limitation) statutes." But the court held that, notwithstanding the fact that the state might have commenced an action against the insurance company by serving a summons upon the insurance commissioner at any time during the period involved, the statute of limitation did not apply in its favor, because, "by section 4231, Rev. St. (1878), it is excluded from the benefits of exemption (general limitation) statutes." It was considered that the case of Travelers' Ins. Co. v. Fricke, 99 Wis, 387, 74 N.W. 372. 78 N.W. 407, 41 L.R.A. 557, determined that the statute of limitation did not apply in favor of foreign corporation, although the statute as to service upon them was as above stated. The court says that, if this were not otherwise correct, the 1897 amendment of the 1873 statute, not contained in the statute when the Travelers' Ins. Co. Case, supra, was decided, made it so. This amendment provided that the provision that actions might be brought against nonresidents "returning to or removing to" the state, within the statutory period after their return or removal, should not apply to foreign corporation maintaining a manufacturing plant in the state which had appointed a resident of the state upon whom process might be served. The argument in this respect was that the special exclusion of one class of corporations from operation of the statute indicated a legislative intent that no other class of corporations should be excluded. The same reasoning would leave nonresident natural persons within section 330.30, even if they had, as now, by virtue of section 85.05 (3), a person within the state upon whom service of summons and complaint might

be made, and thus make the present action maintainable.

To construe the statute as appellants contend we must, as stated, in *State v. National Accident Society*, *supra*, read into Section 330.30 words that are not there. The statute says: "If when a person is out of the state when the cause of action accrues" the statute shall not run until he shall "return to or remove to" the state. The defendants, except Jensen, were out of the state when the cause of action against them accrued. They have not removed to or returned to the state since. As to Jensen, president of the defendant labor union, he was in the state when the action accrued, but he immediately left the state and has not "returned to or removed to" the state since. The Legislature could, had it seen fit, have amended the statute as it did to corporations owning manufacturing plants, etc., so as to cover all persons and all other corporations when a person representing them resided in the state upon whom service might be procured, but it has never done so. This leaves nonresident natural persons as well as nonresident corporation not excepted by the 1897 amendment (chapter 304), not entitled to the benefit of the statute of limitation, although they have designed residents of the state as their attorneys upon whom process may be served."

In the case *Staten vs. Weiss*, 303 Pacific 2nd, page 1021, a case before the Supreme Court of Idaho on date of March 14, 1957, the Supreme Court had before it the question almost exactly like our present case. The question presented was whether the provisions of the statute of limitation had been tolled by an Idaho statute

which states as follows:

"If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

It is to be noted that this statute is exactly the same working as the Utah statute set forth under Section 78-12-35, U.C.A. 1953, except for one word, "when", at the end of the first clause of the Utah statute. The Utah statute states, "...against a person when he is out of the state". We respectfully submit that the word "when" makes no difference in the meaning of the two statutes.

The Defendant in the Idaho case contended that summons could have been served upon him at any time after the cause of action accrued by serving the Secretary of State as the nonresident's attorney, and that therefore, the tolling statute was not applicable to the situation, and that therefore, the two year statute applied and the action was barred. The Idaho Supreme Court said as follows:

"Other courts of last resort have held that a statute which tolls the running of the statute of limitations when a defendant is out of the state when the cause of action accrues, or departs from the state thereafter, will be given effect even though service could have been obtained on

an agent within the state during his absence, for example, a non-resident motorist for injuries inflicted while using the highways of the state. Some decisions taking the view that such possible service on the Secretary of State of other designated involuntary agent is immaterial and the statute stops running during the period of absence from the state, notwithstanding the motor vehicle statute, Sec. 49-1101 and Sec. 49-1202, I.C., or similar legislation are:

Gotheiner v. Lenihan, 20 N.J. Misc. 119, 25 A. 2d 430; Bode v. Flynn, 213 Wis. 509, 252 N.W. 284, 94 A.L.R. 480; Coutts v. Rose, 152 Ohio St. 458, 90 N.E. 2d 139; Maguire v. Yellow Taxi Corporation, 253 App. Div. 249, 1 N.Y.S. 2d 749, affirmed 278 N.Y. 576, 16 N.E. 2d 110; Macri v. Flaherty, D.C., 115 F. Supp. 739.

In Anthes v. Anthes, 21 Idaho 305, 121 P. 553, suit was brought on a promissory note which would have been barred by the provisions of what is now Sec. 5-229, I.C. At that time service of summons and complaint could be made "by leaving a copy thereof and a copy of the complaint in the cause at the usual place of abode of the defendant with a member of the family over the age of twenty-one years." Laws 1907, O. 321.

While the defendant in that case was a resident, he was absent from the state continuously for a period of time sufficient to toll the statute of limitations. This Court held that the statute which provided a method of service of process upon a resident of the state, temporarily absent from his residence or from the state, did not amend Sec. 5-229, I.C. (the tolling statute) and that the statute of limitations ceased to run during the period of absence.

The same principle is announced in Keith O'Brien Co. v. Snyder, 51 Utah 227, 169 P. 954. That Court held that: " * * * if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term limited after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action, applies though the debtor has a place of abode or residence within the state so that process might have been served notwithstanding his absence."

See also Buell v. Duchesne Mercantile Co., 64 Utah 391, 231 P. 123.

In Roberts v. Hudson, 49 Idaho 132, 286 P. 364, this court held that the statute of limitations runs in favor of the debtor only while he is actually in the state and is tolled as soon as he leaves the state.

Many states have passed statutes similar to Secs. 49-1201 and 49-1202, I.C. which in substance provide that non-resident owners, operators of, or persons riding in motor vehicles are granted the privilege of using the roads, highways and streets of this state and that by so doing such operator, or other persons therein enumerated shall be deemed the equivalent to an appointment by such non-resident of the Secretary of State of the state of Idaho, to be his true and lawful attorney, upon whom may be served all lawful summonses and processes against him growing out of any accident or liability in which said non-resident may be involved while operating, causing, or permitting the operation of a motor vehicle upon such highways.

(1) Under the statute, Sec. 49-1202, I. C., the appointment of the Secretary of

State as such motorist's attorney is an involuntary, irrevocable one. Nor, is bare service on the Secretary of State sufficient for the court to acquire jurisdiction of the controversy. The statute further provides: " * * * such service shall be sufficient and valid personal service upon said non-resident; provided, notice of such service and a copy of the process is forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and plaintiff's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof; provided further, that personal service outside of the state in accordance with the provisions of the statutes of Idaho relating to personal service of summons outside of the state shall relieve a plaintiff from mailing copies of the summons or process by registered mail as hereinbefore provided. Service of said process upon a defendant shall not be complete until the same is either made by registered mail or by personal service outside of the State."

It thusly appears that in case of service of summons and complaint on the Secretary of State as the involuntary agent of a non-resident motorist is incomplete unless the same is sent by registered mail to the defendant and defendant's return receipt secured, or in lieu thereof, personal service made outside the state of such summons and complaint. The provision for obtaining such service contains no specific exception to the provisions tolling the statute of limitation, Sec. 5-229, I.C. Nor can we read such an exception into the motor vehicle act. The statutes for interpretation are not in irreconcilable conflict.

(2) We are therefore constrained to hold that where a statute tolls the running of the statute of limitations when the defendant is out of the state when the cause of action accrues, or departs from the state thereafter will be given effect even though service could have been obtained on an involuntary agent, in this case the Secretary of State, during his absence."

CONCLUSION

1. Under the provision of Section 78-12-35, Utah Code Annotated 1953, the absence of the defendants from the state of Utah tolled the running of the statute of limitations, and, therefore, the judgment of the lower court should be affirmed.

Respectfully submitted,

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